



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2011

Ms. Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

OR2011-04285

Dear Ms. Decker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 413154 (PIR No. 11.01.07.10).

The Texas Commission on Environmental Quality (the "commission") received a request for all information related to a specified on-site sewage facility aerobic system during a specified period. You state the commission has made some of the responsive information available to the requestor. You claim the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You seek to withhold certain information you claim is identifying of the complainant under the informer's privilege. You explain the commission has the authority to enforce chapter 26 of the Water Code. However, based on our review of the submitted information, violations of that chapter are alleged to have been committed, not reported, by the complainant. Although the complainant does allege certain violations by the Bell County Public Health District and her maintenance provider, the submitted information contains a letter in which the commission explains that it does not have the duty and power of enforcement with regard to those violations. Thus, we find you failed to explain how the commission has the duty and authority to enforce the violations reported by the complainant. Accordingly, the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer's privilege.

We note the submitted information contains the complainant's personal e-mail address, which may be subject to section 552.137 of the Government Code.² Section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act], unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). The e-mail address at issue is not specifically excluded by section 552.137(c). However, the requestor in this instance is an attorney who may represent the complainant. Thus, if the requestor is the complainant's authorized representative, he has a right of access to the complainant's e-mail address under section 552.137(b), and the submitted information must be released in its entirety to the

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

requestor.³ If the requestor is not the complainant's authorized representative, then the e-mail address we marked must be withheld under section 552.137 of the Government Code, unless the complainant has consented to its release. In that case, the commission must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 413154

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³In such case, if the commission receives another request for this information from a requestor without such a right of access, it is authorized to withhold the complainant's e-mail address under section 552.137, without the necessity of requesting an attorney general decision, pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).